SETIA AWAN MANAGEMENT SDN BHD
v. SPNB ASPIRASI SDN BHD

COURT OF APPEAL, PUTRAJAYA
LEE SWEE SENG JCA
CHOO KAH SING JCA
AHMAD FAIRUZ ZAINOL ABIDIN JCA
[CIVIL APPEAL NO: A-02(IM)(C)-1587-09-2024]
28 FEBRUARY 2025

Abstract – *A party cannot proceed to court when the other party wants to arbitrate pursuant to a valid arbitration agreement. This is so whether the right to proceed with arbitration is either at the option of one party or that both have the option to choose either option or to choose one option normally stated to be arbitration. The test is not whether there is a valid agreement to go to court for that is an inherent right in the absence of a special bargain to arbitrate. The test is whether any one of the parties has opted for arbitration at which instance an arbitration agreement has come into being.*

ARBITRATION: *Stay of proceedings – Parties entered into agreement for residential development project – Agreement contained arbitration clause – Dispute arose and one party terminated agreement and demanded compensation – Other party claimed for damages for breach of agreement – One party applied for stay of court proceedings pending reference to arbitration – Whether there was arbitration agreement between parties – Whether court ought to grant stay of its proceedings in favour of arbitration – Whether giving of option to parties to proceed to court or to arbitration rendered arbitration agreement null and void, inoperative or incapable of being performed – Whether arbitral tribunal tasked to rule on validity of arbitration agreement – Arbitration Act 2005, ss. 10 & 18*

The respondent ('plaintiff') had entered into a development and contra transaction ('DACT') agreement with the appellant ('defendant') for a residential development project ('project'). The DACT agreement contained an arbitration clause. When disputes arose between the parties, the defendant terminated the DACT agreement and demanded compensation of RM311,897,723. The plaintiff, in response, claimed against the defendant for damages for the defendant's breach of the DACT agreement. The defendant, before taking any steps in the proceedings, applied under s. 10 of the Arbitration Act 2005 ('AA'), for stay of the court proceedings pending reference to arbitration. The High Court dismissed the stay application and held that: (i) as the key components of an arbitration agreement had not been agreed upon, such as the seat of arbitration, the number of arbitrators and the mode of their appointment, the arbitration clause was rendered null and void, inoperative and incapable of performance under s. 10(1) of the AA;

(ii) the arbitration agreement that gave the parties an option to proceed with litigation or arbitration was not a binding arbitration agreement that clearly and unequivocally required the dispute to be resolved exclusively through arbitration. Such an arbitration agreement was null and void for failing to meet the requirements of the AA and was also unenforceable as it lacked certainty; (iii) the permissive word 'may', offering the parties the option to refer the disputes either to arbitration or to the court with respect to resolving the dispute, indicated a discretion vested on the parties and the non-mandatory language of reference to arbitration made the arbitration clause unenforceable; and (iv) whilst the plaintiff had commenced a legal suit in the High Court and thus elected to proceed with court proceedings, the defendant had not served a notice of arbitration to trigger arbitration proceedings. Hence, the present appeal. The issues that arose were: (i) whether there was an arbitration agreement between the parties requiring the court to grant a stay of its proceeding in favour of arbitration; (ii) whether the giving of an option to the parties to proceed to court or to arbitration rendered the arbitration agreement null and void, inoperative or incapable of being performed; and (iii) whether the doctrine of kompetenze-kompetenze was such that the arbitral tribunal itself was tasked to rule on the validity of the arbitration agreement.

Held (allowing appeal; setting aside order of High Court)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1a) The lack of an agreement on the seat of arbitration or the number of arbitrators constituting the arbitral tribunal or the mode of appointment of the arbitrator would not, in any way, prejudice the parties or the arbitration. Other matters, such as the law of the arbitration and that of the arbitration agreement were non-issues, seeing that the parties were all Malaysian domestic parties with the project in Malaysia. The arbitration clause in question was both simple and succinct in that both the parties may elect to proceed with either going to court or arbitration in the event of a dispute. (paras 20 & 21)

(1b) While the word 'may' is permissive, yet once the option was exercised to proceed further in a stand-alone arbitration agreement, it became exclusive in that the only route open in going forward was that of arbitration. A word like 'may' has the effect of qualifying a few subjects in a sentence as in it is not mandatory that one must proceed with arbitration the moment there is a dispute or differences but should one want to proceed further to resolve the dispute or differences, then the only route open is *via* arbitration in a case of a stand-alone arbitration clause. (para 34)

(1c) There was an arbitration agreement once either one of the two parties exercised the option to arbitrate. The court would hold the parties to the bargain struck and grant a stay of the court proceedings so that the contractual rights of the party electing for arbitration may be enforced. (para 50)

(2) Just because an option is available, it does not mean that the parties' intention to proceed with arbitration is less certain and not mandatory as in lacking contractual commitment to arbitrate their disputes or differences. The arbitration clause was what it said it was – giving an option equally to both parties to elect between going to court or arbitration. Before the option is exercised, either party could potentially opt for arbitration. Once either party opts for arbitration, an arbitration agreement would have come into existence. There was no basis to say that once an option to go to court is exercised, the option for the other party is extinguished. Being satisfied that the requirements of s. 10 of the AA had been met, the court was left with one recourse, which was to uphold the arbitration agreement and to stay the court proceedings. (paras 60, 62 & 87)

(3) Section 18 of the AA expressly empowered the arbitral tribunal on whether it had jurisdiction to hear the matter raised before it. It covered issues of the existence as well as the extent of the arbitration agreement. Here, the existence of the arbitration clause was not in dispute and the only dispute was whether such an arbitration clause, as worded, was a valid arbitration agreement that was not null and void and that was operative and capable of being performed. It was a question of interpretation of the arbitration clause in question. All that the court had to be satisfied was whether there was a valid arbitration agreement. Whether it was *prima facie* finding on the full merits of the case, appeared to yield no difference in result as even a *prima facie* case finding of a valid arbitration was sufficient for the grant of a stay in favour of arbitration as the plaintiff could not show that the arbitration agreement was otherwise null and void, inoperative or incapable of performance. (paras 88 & 106)

Case(s) referred to:

Acada Developments Co Ltd v. Epco Industrie-Ausruestungen GMBH [1985] 1 HKC 465 ***(refd)***

Asia Pacific Higher Learning Sdn Bhd v. Stamford College (Malacca) Sdn Bhd [2024] CLJU 1598 CA ***(refd)***

Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal [2023] 1 CLJ 20 CA ***(refd)***

FAMG Idaman Resources v. Jasmadu Sdn Bhd [2019] 9 CLJ 763 HC ***(refd)***

Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***

Hermes One Ltd v. Everbread Holdings Ltd [2016] 1 WLR 4098 ***(refd)***

Hobbs Padgett & Co (Reinsurance) Ltd v. JC Kirkland Ltd & Kirkland [1969] 2 Lloyd's Rep 547 ***(refd)***
Insigma Technology Co Ltd v. Alstom Technology Ltd [2009] 3 SLR 936 ***(refd)***
Joint Stock Company 'Aeroflot Russian Airlines' v. Berezovsky [2013] EWCA Civ 784 ***(refd)***
Lobb Partnership Ltd v. Aintree Racecourse Co Ltd [1999] 69 ConLR 79 ***(refd)***
Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd & Other Appeals [2023] CLJU 1078, [2023] 1 LNS 1078 CA ***(refd)***
Manningham City Council Dura (Australia) Constructions Pty Ltd [1999] VSCA 158 ***(refd)***
Nigel Peter Albon v. Naza Motor Trading Sdn Bhd [2007] 2 All ER 1075 ***(refd)***
PMT Partners Pty Ltd (In Liquidation) v. Australian National Parks And Wildlife Service [1995] HCA 36 ***(refd)***
Private Company 'Triple V Inc' v. Star (Universal) Co Ltd [1995] 3 HKC 129 ***(refd)***
Stamford College (Malacca) Sdn Bhd v. Asia Pacific Higher Learning Sdn Bhd [2023] CLJU 2337; [2023] 1 LNS 2337 HC ***(refd)***
Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal [2020] 4 CLJ 301 FC ***(refd)***
Tomolugen Holdings Ltd v. Silica Investors Ltd [2015] SGCA 67 ***(refd)***
Tritonia Shipping Inc v. South Nelson Forest Products Corp [1966] 1 Lloyd's Rep 114 ***(refd)***
Uzma Engineering Sdn Bhd v. Khan Co Ltd & Anor [2023] CLJU 1431; [2023] 1 LNS 1431 HC ***(refd)***
Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd [2017] SGCA 32 ***(refd)***

Legislation referred to:
Arbitration Act 2005, ss. 2(1), 4(1), 8, 9(1), 10(1), (3), 12, 13(2), (5), (6), (7), 18(1), (2), 22(2)
Commercial Arbitration Act 1984, s. 53(1)
Contracts Act 1950, s. 29
National Land Code, s. 418
Rules of Court 2012, O. 69 r. 10(3)

Arbitration Act 1994 [Hong Kong], s. 34(1)
Arbitration Act 1996 [UK], ss. 9(1), (4), 32
Arbitration Act 2001 [Sing], s. 21(9)
International Arbitration Act 1994 [Sing], s. 10(3)

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[Editor's note: For the High Court judgment, please see SPNB Aspirasi Sdn Bhd v. Setia Awan Management Sdn Bhd [2024] CLJU 2682 (overruled).]

Reported by Lina E

JUDGMENT

Lee Swee Seng JCA:

[1] The arbitration agreement here is rather uncommon but simple enough to be understood even on first reading. It gives the parties to the contract an option, in the event of a dispute, to either go to court or proceed with

arbitration. When a dispute did arise in this matter, one party proceeded with filing a writ action in court only to be met by the other party applying to stay the court proceedings on the grounds that there is an arbitration agreement that requires the dispute to be referred to arbitration.

Before The High Court

[2] The High Court dismissed the stay application made under s. 10 of the Arbitration Act 2005 ('AA 2005') and held that as the key components of an arbitration agreement had not been agreed upon, such as the seat of arbitration, the number of arbitrators and the mode of their appointment, the arbitration clause was rendered null and void, inoperative and incapable of performance under s. 10(1) of the AA 2005.

[3] The High Court also held that the arbitration agreement that gives the parties an option to proceed with litigation or arbitration is not a binding arbitration agreement that clearly and unequivocally requires the dispute to be resolved exclusively through arbitration. The High Court further held that such an arbitration agreement is null and void for failing to meet the requirements of the AA 2005 and is also unenforceable as it lacks certainty.

[4] The High Court was of the view that the permissive word "may" offering the parties the option to refer the disputes either to arbitration or to the court with respect to resolving the dispute indicates a discretion vested in the parties and the non-mandatory language of reference to arbitration makes the arbitration clause unenforceable.

[5] The High Court further held that whilst the plaintiff had commenced a legal suit in the High Court and thus elected to proceed with court proceedings, the defendant had not served a notice of arbitration to trigger arbitration proceedings. The High Court was also influenced by the fact that the defendant in its notice of demand had threatened legal proceedings instead of arbitration indicating an opting for proceeding with a suit in court. The High Court also noted that the plaintiff having opted to initiate court proceedings, it had effectively exercised the option for litigation thereby excluding the possibility of arbitration for the dispute.

[6] The defendant, being dissatisfied with the decision of dismissing its stay application, appealed to the Court of Appeal.

In The Court Of Appeal

[7] The defendant as appellant before us, argued that the arbitration agreement giving an option to the parties to elect whether to proceed to court or to arbitration in the event of a dispute is a valid arbitration agreement.

[8] Even if there is doubt as to the validity of the arbitration agreement, the court should lean in favour of arbitration.

[9] It was further argued that when a matter comes to the court under s. 10 of the AA 2005, all that the court needs to decide is whether there is an arbitration agreement broad enough to cover the dispute in question and for so long as the arbitration agreement is not null or void, not inoperative or incapable of performance, the court is required to grant a stay of the court proceedings pending reference to arbitration.

Whether There Is An Arbitration Agreement Between The Parties Requiring The Court To Grant A Stay Of Its Proceedings In Favour Of Arbitration

[10] The plaintiff, SPNB Aspirasi Sdn Bhd, is a subsidiary of Syarikat Perumahan Negara Berhad ('SPNB'). On 17 May 2018 it entered into a Development and Contra Transaction ('DACT') Agreement with Setia Awan Management Sdn Bhd, the defendant, for a residential development project in Sitiawan, Perak ('the project').

[11] Under the DACT, the defendant was to develop the project and the plaintiff was to purchase 20 plots of land and transfer 1,169 units valued at RM248,035,014 as part of the financing. Disputes arose between the parties with the defendant alleging that the lands identified were not transferred to it and so the defendant terminated the DACT agreement in July 2021 and demanded compensation of RM311,897,723.

[12] The plaintiff, in response, claimed against the defendant by filing a suit for damages for the defendant's breach of the DACT agreement. The defendant, before taking any further steps in the proceedings, applied under s. 10 of the AA 2005 for a stay of the court proceedings pending reference to arbitration.

[13] Clause 18 of the DACT agreement contains the arbitration clause that reads:

> In the event that any dispute or difference whatsoever shall arise between parties touching or concerning this Agreement or its construction or effect or as to the rights, duties or liabilities of either party or of parties hereto under this Agreement in connection with the subject matter of this Agreement **the same maybe (*sic*) referred to any court in Malaysia or to arbitration in accordance with the provisions of the Arbitration Act 2005** or any statutory modification or re-enactment thereof.
>
> (emphasis added)

[14] We must first dispel the notion that there is no valid arbitration agreement if the key components of an arbitration agreement had not been agreed upon such as the seat of arbitration and the number of arbitrators and the mode of their appointment. The High Court appeared to have laboured under that misconception. All that the relevant subsections to s. 9 of the AA 2005 state with respect to an arbitration agreement are as follows:

9. Definition and Form of Arbitration Agreement

(1) In this Act, "arbitration agreement" means an **agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them** in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing … (emphasis added)

[15] As can be seen there is no further requirement that parties to the arbitration agreement must agree on the seat of arbitration or the number of arbitrators or the mode of appointment. Where "seat of arbitration" is concerned that is defined in s. 2(1) of the AA 2005 as meaning "the place where the arbitration is based as determined in accordance with s. 22". Section 22 in turn stipulates as follows:

Seat of arbitration

22. (1) The parties are free to agree on the seat of arbitration.

(2) **Where the parties fail to agree under subsection (1), the seat of arbitration shall be determined by the arbitral tribunal** having regard to the circumstances of the case, including the convenience of the parties.

(3) Notwithstanding subsections (1) and (2), the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property or documents. (emphasis added)

[16] Where the AA 2005 provides for a mode of determining the seat of arbitration if the parties could not agree under s. 22(2), there is clearly no basis for finding an arbitration clause to fail to qualify as an arbitration agreement merely because the seat of arbitration had not been agreed. Here, we are dealing with a domestic arbitration where both parties are Malaysian companies and the applicable law is Malaysian law and the project is in Sitiawan in the State of Perak in Malaysia. The dispute, if any, on the seat of arbitration immediately vanishes and vapourises!

[17] As for the so-called key component of the number of arbitrators, Parliament in its wisdom, had provided a default position, such that a failure to address this component would not cause the intention of the parties to go for arbitration to fail. Section 12 of the AA 2005 provides as follows:

Number of arbitrators

12. (1) The parties are free to determine the number of arbitrators.

(2) Where the parties fail to determine the number of arbitrators, the arbitral tribunal shall -

A (a) in the case of an international arbitration, consist of three arbitrators; and

(b) in the case of a domestic arbitration, consist of a single arbitrator.

[18] This being a domestic arbitration, the default number is one arbitrator. The absence of the parties' agreement on this does not render the arbitration B agreement invalid.

[19] With respect to the mode of appointing an arbitrator, again we fall back on the AA 2005 and in s. 13(2), it is provided that the parties are free to agree on a procedure for appointing the arbitrator or the presiding C arbitrator. Anticipating that a party to an arbitration agreement may drag its feet and thus delay the process of getting the arbitration off the ground, Parliament had provided a s. 13(5), (6) and (7) that read as follows:

(5) Where in an arbitration with a single arbitrator -

D (a) **the parties fail to agree on the procedure referred to in subsection (2)**; and

(b) the parties fail to agree on the arbitrator, **either party may apply to the Director of the Asian International Arbitration Centre (Malaysia) for the appointment of an arbitrator.**

E (6) Where, the parties have agreed on the procedure for appointment of the arbitrator -

(a) a party fails to act as required under such procedure;

(b) the parties, or two arbitrators, are unable to reach an agreement under such procedure; or

F (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure, or

any party may request the Director of the Asian International Arbitration Centre (Malaysia) to take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the G appointment.

(7) Where the Director of the Asian International Arbitration Centre (Malaysia) is unable to act or fails to act under subsections (4), (5) and (6) within thirty days from the request, **any party may apply to the High Court for such appointment.** (emphasis added)

H **[20]** Here the arbitration agreement made reference to an arbitration "in accordance with the provisions of the Arbitration Act 2005" and thus, any "key components" not expressly referred to in the arbitration clause or by a prior agreement would fall back and rely on the default provisions of the AA 2005. Thus, the lack of an agreement on the seat of arbitration or the I number of arbitrators constituting the arbitral tribunal or the mode of appointment of the arbitrator would not in any way prejudice the parties or

the arbitration. Other matters such as the law of the arbitration and that the arbitration agreement are non-issues seeing that the parties are all Malaysian domestic parties with the project in Malaysia. So too the rules governing the arbitration as that too would be decided by the court should the parties not come to an agreement.

[21] The arbitration clause in question is both simple and succinct in that both parties may elect to proceed with either going to court or arbitration in the event of a dispute. At this stage of stay under s. 10 of the AA 2005 the court is tasked with making a finding as to whether there is a valid arbitration agreement. In other words, it is a pure question of interpretation which is a question of law.

[22] This is not a case where the plaintiff is asserting that the underlying DACT agreement containing the arbitration clause was entered into through duress, fraud or fraudulent misrepresentation or forgery. Even in such cases the court has applied the "full merits test" or follow a "just and convenient" approach as enunciated by the Court of Appeal in *Macsteel International Far East Ltd v. Lysaght Corrugated Pipe Sdn Bhd & Other Appeals* [2023] CLJU 1078; [2023] 1 LNS 1078; [2023] 4 MLJ 551.

[23] The test as set out in s. 10 of the AA 2005 is that there must be; (i) an arbitration agreement; (ii) a matter which is the subject of the arbitration agreement and (iii) that the arbitration agreement is not null and void, inoperative or incapable of being performed; all on the basis that the applicant for the stay has not taken any other steps in the proceedings which in this case is not disputed. Section 10(1) reads:

> **Arbitration agreement and substantive claim before court**
>
> 10. (1) A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[24] In *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693 FC at [108] and [109] ('*Far East Holdings*') the Federal Court once again emphasised the mandatory need for the court to stay the proceedings before it, once it finds that there is an arbitration agreement between the parties in a matter that is covered by the arbitration agreement as follows:

> [108] … In *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417, it was held by Ramly Ali FCJ, delivering the judgment of the court, that s. 10(1) of AA 2005 is not tied to s. 6 of AA 1952: Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 ('the 1952 Act'). The issue of stay of proceedings in the 1952 Act was dealt with under s. 6 thereof which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and *the court, if satisfied that there is no* sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.
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> *The clear effect of the present s. 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled;* while under s. 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.
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> What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) *is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference* (see TNB Fuel Services Sdn Bhd). In fact, the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal. (emphasis added)

[25] See also the Federal Court case of *FAMG Idaman Resources v. Jasmadu Sdn Bhd* [2019] 9 CLJ 763.

[26] It is true that the word "may" is used with respect to the parties' right to choose arbitration as the preferred mode to resolve any disputes or differences that may arise under the DACT agreement between the parties as in "… the same maybe (*sic*) referred to any court in Malaysia or to arbitration in accordance with the provisions of the Arbitration Act 2005 …". However the word "may", though not the language of compulsion as in commanding but the language of common courtesy as in considering, there is nothing ambiguous as to the parties' intention should the disputes or differences cannot be resolved through perhaps negotiations and mediation.

[27] What is equally clear is that parties are not obliged or mandatorily required by contract to pursue arbitration each time they cannot amicably resolve their disputes or differences. They are perfectly entitled to accept and live with the disputes or differences and perhaps suffer loss as a result. It is only when they want to proceed further in resolving their disputes or differences that arbitration is specifically spelt out as the route that the parties may choose.

[28] It would be quite inappropriate to have used the word "shall" to qualify the course of action to be taken *via* arbitration because that would compel the parties to proceed with arbitration the moment they cannot resolve their disputes or differences amicably on the pain of being held in breach of the DACT agreement if one of the parties does not so proceed. That certainly cannot be the case.

[29] The Privy Council in *Hermes One Ltd v. Everbread Holdings Ltd* [2016] 1 WLR 4098 ('*Hermes One*') said in words characteristic of its wisdom that:

> 12. Arbitration clauses commonly provide that unresolved disputes "should" or "shall" be submitted to arbitration. The silent concomitant of such clauses is that neither party will seek any relief in respect of such disputes in any other forum …
>
> …
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> However, even the words "should" or "shall" cannot be taken entirely literally. **There is no obligation to commence arbitration, if a party decides to do nothing. But the words "should" and "shall" do make clear that it is a breach of contract to litigate.** (emphasis added)

[30] The relevant parts of the arbitration agreement in the *Hermes One* (*supra*) case read as follows:

> … If a dispute arises out of or relates to this Agreement or its breach (whether contractual or otherwise) and the dispute cannot be settled within twenty (20) business days through negotiation, **any Party may submit the dispute to binding arbitration** … (emphasis added)

[31] The Privy Council held that:

> 13. … The consequence of the appellants' case would, at least in theory, be that the respondent's commencement of litigation was a breach of contract, for which the appellants proving loss could without more claim damages - though the prevalence of clauses providing that arbitration "shall" take place and the infrequency of claims for their breach may again reduce the weight of this factor. The fact remains that there is an obvious linguistic difference between a promise that disputes shall be submitted to arbitration and a provision, agreed by both parties, that "any party may submit the dispute to binding arbitration". This clear contrast and the evident risk that the word "may" may be understood by parties to mean that litigation is open, unless and until arbitration is elected …

[32] It is thus not mandatory for the parties to proceed further should they fail to resolve their disputes but should either of them choose to proceed further then they may have the option in the instant case to choose to go to court or to arbitration.

[33] In other words, should the parties want to proceed further in resolving their disputes or differences, normally after exhausting negotiation and mediation, they cannot be faulted for choosing arbitration. Even if the

arbitration clause were a standalone clause with no option to choose between going to court or arbitration, the parties may not proceed to court but may only proceed to arbitration. For example, one would say "you may not proceed to court but only to arbitration" and that "may" though generally not denoting compulsion would have the same effect as in constraining one to only follow the arbitration pathway. Thus, the arbitration clause, standing alone for the sake of argument, as it is worded makes it no less mandatory to proceed if one chooses to proceed further after a dispute or differences have arisen between the parties.

[34] Whilst the word "may" is permissive, yet once the option is exercised to proceed further in a stand-alone arbitration agreement, it becomes exclusive in that the only route open in going forward is that of arbitration. A word like "may" has the effect of qualifying a few subjects in a sentence as in it is not mandatory that one must proceed with arbitration the moment there is a dispute or differences but should one want to proceed further to resolve the dispute or differences then the only route open is *via* arbitration in a case of a standalone arbitration clause.

[35] If we may take a leaf from the National Land Code ('NLC') where in s. 418 it is provided as follows:

> **Appeals to the Court**
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> 418.(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator **may**, at any time **within the period of three months** beginning with the date on which it was communicated to him, **appeal** therefrom to the Court.
>
> (emphasis added)

[36] Thus, while it is not mandatory for any person or body aggrieved by any decision under the NLC to have to appeal for they may well live with the decision or consider the chances of succeeding very slim, yet should they decide to appeal, they may not do so outside the "three months" period specified. None would have the audacity to argue that the "three months" period is not mandatory the moment one elects to appeal against the decision in question.

[37] It is a given that going to arbitration has to be an agreement between the parties because no court can compel the parties to arbitrate unless the parties to the dispute have a valid arbitration agreement. On the other hand, going to court or to the ordinary tribunals as may be provided by statute, is an inherent right of everyone who thinks he has a valid cause of action against the other and that an agreement does not have to provide for it before a person may pursue a matter in court. In fact, such a right is protected under the law and cannot be bargained away. Thus, we have s. 29 of the Contracts Act 1950 that reads:

Agreements in restraint of legal proceedings void

29. Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights, is void to that extent.

Saving of contract to refer to arbitration dispute that may arise

Exception 1 – This section shall not render illegal a contract by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in the arbitration shall be recoverable in respect of the dispute so referred.

[38] Little wonder that the moment a court has a whiff of the parties' intention, through the words employed, to proceed with arbitration, even if there be some doubts arising out of the infirmities in the language used or some conflicts with other clauses within the underlying agreement, the court would still lean in favour of upholding arbitration unless the arbitration agreement itself is so pathological as to be incapable of saving.

[39] It has even been held that a reference to a non-existent Arbitration Institution and its Rules governing the arbitration does not render the arbitration agreement invalid and this is so even when several agreements between the parties refer to different Rules of Arbitration as was the case in *Uzma Engineering Sdn Bhd v. Khan Co Ltd & Anor* [2023] CLJU 1431; [2023] 1 LNS 1431. In that case, one letter of award issued to the first defendant (D1) referred to arbitration under the Rules of Arbitration of the Regional Centre for Arbitration in Singapore. There were also four other letters of award issued by the plaintiff to the second defendant ('D2') where one has the same arbitration clause as the above and the other three letters of award made reference to arbitration under the Rules of Arbitration of the Kuala Lumpur Regional Centre for Arbitration.

[40] As is not unusual, when disputes arose between the parties, D1 commenced arbitration in Singapore with the Singapore International Arbitration Centre ("SIAC") which duly registered the arbitration. The plaintiff meanwhile, proceeded with a legal suit in the Kuala Lumpur High Court against the defendants D1 and D2. Both defendants then applied for a stay of the court proceedings under s. 10 of the AA 2005 on grounds that there is a valid arbitration agreement in the first letter of award to D1.

[41] In trying to discern the intention of the parties the High Court reasoned as follows:

33. With regards D1, this Court has noted that it was argued by the Plaintiff that there are various arbitration centres in Singapore and that the Singapore International Arbitration Centre (SIAC) is only one of the arbitration centers in Singapore. After looking at the so called other

various arbitration Centre's in Singapore such as the ICC Secretariat of the International Court of Arbitration Singapore, Singapore Institute of Arbitrators, Singapore branch of the Chartered Institute of Arbitrators, International Center for Dispute Resolution and the Singapore Chambers of Maritime Arbitration, I find that and agree with learned counsel for D1, that the other centre/institutions are quite irrelevant or have no bearing in the matter or issues between D1 and the Plaintiff as they are either a secretariat or institute and are thus not arbitration centre or lastly a maritime center of arbitration, which in my view the issues before the parties do not center around a maritime issue, and therefore the said institutions are quite separate and distinct from a reference to a Regional Center for Arbitration in Singapore.

34. The term 'Regional Center for Arbitration in Singapore' in the Arbitration Agreement in LA 24.8.2016, would in this Court's view be apparent to the parties be it D1, and/or the Plaintiff, that the aforementioned term would refer to the SIAC. This is partly reflected by D's Notice of Arbitration dated 1.3.2022, which was issued by D's then solicitors, Messrs Zaid Ibrahim & Co in enclosure 86 exhibit KCL-2, which makes reference to the SIAC in the following words:

> As such the Claimant is exercising its rights under clause 7 of the Letter of Award to refer this dispute to the Singapore International Arbitration Centre (SIAC). The Arbitration Clause, *inter alia* provides as follows ...

35. I consequently based on all my findings on this issue above, hold that the words/language in the Arbitration Agreement as being not so obscure and/or so incapable of any definite or precise meaning that the court is unable to attribute to the parties any particular contractual intention. I therefore hold that the precise seat of arbitration can be made certain with reasonable certainty and that in respect of the LA 24.8.2016 refers to the SIAC.

[42] There is a world-wide trend, especially with countries that subscribe to the UNCITRAL Model Law on International Arbitration, of giving every encouragement towards saving and sustaining an arbitration clause even though the words employed to evince an intention to arbitrate are less than elegant and or even embarrassingly inconsistent. Even an economical one word, reference to "arbitration" may suffice.

[43] In Singapore for instance, the Court of Appeal in *Insigma Technology Co Ltd v. Alstom Technology Ltd* [2009] 3 SLR 936 observed as follows:

> ... where the parties have evinced a clear intention to settle any dispute by arbitration, the court should give effect to such intention, **even if certain aspects of the agreement may be ambiguous, inconsistent, incomplete or lacking in certain particulars** ... so long as the arbitration can be carried out without prejudice to the rights of either party ...
>
> (emphasis added)

[44] In Hong Kong, the Court of Appeal in *Acada Developments Co Ltd v. Epco Industrie-Ausruestungen GMBH* [1985] 1 HKC 465 took this generous approach towards supporting an arbitration agreement with the warm embrace that even a single word "arbitration" in context in an agreement may suffice as follows:

> That really concludes the matter for it is now strictlyunnecessary to consider whether the two items, either item 17 by itself or item 17 read with item 16, constituted a provision for arbitration. On this point I would merely say this, that for myself I think they do. **They are not so vague or so uncertain as to be void.** Had there been an agreement between the parties, evidenced by their inclusion in the contract, I would have thought that the words 'Arbitration: If any, arbitration is to be held in Hong Kong' coupled with the provision 'Hong Kong Law Shall Govern' could amount to an arbitration clause. **The court will lean against frustrating the intention of the parties and will try to give such clause a meaning. Even the single word 'arbitration', in context, in an agreement will suffice:** … (emphasis added)

[45] Even if there be an iota of doubt as to the validity of the arbitration agreement or some traces of ambiguity in a less than clear arbitration agreement, the court would still pivot in favour of arbitration as was in the UK case of *Lobb Partnership Ltd v. Aintree Racecourse Co Ltd* [1999] 69 ConLR 79, where the arbitration agreement was said to be ambiguous because the arbitration clause ended with "but shall otherwise be referred to the English Courts". Nonetheless, the court upheld the validity of the clause on the ground that:

> The English courts have consistently taken the view that, provided that the contract gives a reasonably clear indication that arbitration is envisaged by both parties as a means of dispute resolution, **they will treat both parties as bound to refer disputes to arbitration even though the clause is not expressed in mandatory terms.** (emphasis added)

[46] The courts would lean in favour of supporting the parties' intention to arbitrate as may be evidenced even in a terse clause as no one would be using the word "arbitration" without intending it to mean what it says and so "Arbitration to be settled in London" was held to be sufficiently clear to be enforced as was held in *Tritonia Shipping Inc v. South Nelson Forest Products Corp* [1966] 1 Lloyd's Rep 114. A single word "Arbitration" would speak volume of the parties' intention and would suffice as was held in *Hobbs Padgett & Co (Reinsurance) Ltd v. JC Kirkland Ltd & Kirkland* [1969] 2 Lloyd's Rep 547 at 549.

[47] Learned counsel for the respondent accepted the fact that the Court of Appeal case of *Asia Pacific Higher Learning Sdn Bhd v. Stamford College (Malacca) Sdn Bhd* [2024] CLJU 1598; [2024] MLJU 1712 which had a similar arbitration clause had been reversed by the Federal Court. The Court

of Appeal had decided that the arbitration clause is valid and not vague or ambiguous. Clause 36(a) of the relevant agreement as found in the High Court's judgment of *Stamford College (Malacca) Sdn Bhd v. Asia Pacific Higher Learning Sdn Bhd* [2023] CLJU 2337; [2023] 1 LNS 2337 which stated as follows:

> Any dispute under this Agreement between the parties to this Agreement shall be settled by a single arbitrator mutually as agreed by the partied to this Agreement or under the courts of Malaysia.

[48] The Court of Appeal in dismissing the appeal and affirming the High Court's decision to dismiss the stay application under s. 10 of the AA 2005 said:

> [31] We have accordingly reviewed the arbitration clause in the Agreement and *find it is ambiguous because clause 36(a) gives the choice or option to the parties to resolve their disputes either by arbitration or litigation in the court. As the result and most crucially, we find there is no imperative and binding obligation upon the parties to mandatorily refer their disputes to be resolved via arbitration.* In *Morello Sdn Bhd v. Jacques (International) Sdn Bhd* [1995] 1 MLJ 577 (FC), Edgar Joseph Jr FCJ held that for the purposes of construction of contracts, the intention of the parties is the meaning of the words they have used. Hence, said His Lordship, the question to be answered always is "what is the meaning of what the parties have said", and not "what did the parties mean to say". Put simply, *we conclude that the parties have not unequivocally agreed in the arbitration clause to have their disputes solely referred to arbitration.* This uncertain poorly drafted arbitration clause here, in our view, is fatal to the Appellant's Application. (emphasis added)

[49] The Federal Court in allowing the appeal on 28 October 2024 in Federal Court Civil Appeal 02(i)-24-07-2024(B) in its minutes recorded as follows:

> This is our unanimous decision. We agree with the Court of Appeal that there is an arbitration agreement pursuant to Enclosure 36 of the memorandum of agreement. We disagree with the Court of Appeal that the arbitration agreement is ambiguous. We find no ambiguity in the arbitration agreement hence stay should have been granted. Even if there is ambiguity in the arbitration agreement, it is for the arbitral tribunal to decide on this issue as provided for under Section 18 on the doctrine of kompetenz-kompetenz. We therefore allow the appeal with costs of RM100,000.00 to the Appellant subject to allocator ...

[50] It is our considered view that there is an arbitration agreement once either one of the two parties exercised the option to arbitrate and the court would hold the parties to the bargain struck and grant a stay of the court proceedings so that the contractual rights of the party electing for arbitration may be enforced.

Whether The Giving Of An Option To The Parties To Proceed To Court Or To Arbitration Renders The Arbitration Agreement Null And Void, Inoperative Or Incapable Of Being Performed

[51] It must not be forgotten the opening words of s. 10(1) of the AA 2005 introduce the fact that a matter, which is the subject of an arbitration, has come before the court. How does a matter come to court? First, it could be that a party to the arbitration agreement has, in default, come before the court because of its intention to avoid arbitration though both parties had earlier agreed in the arbitration agreement. That is probably by far the most common and a court would generally have no hesitation to grant a stay of the court proceedings in favour of the parties proceeding with arbitration as earlier agreed.

[52] The case of the Federal Court in *Tindak Murni Sdn Bhd v. Juang Setia Sdn Bhd & Another Appeal* [2020] 4 CLJ 301; [2020] 3 MLJ 545 speaking through Nallini Pathmanathan FCJ highlighted once again the obligation of the court to grant a stay of the court proceedings when there is a valid arbitration agreement between the parties and the stay application has been made before taking any further steps in the court proceedings as follows:

> [49] ... it therefore remained incumbent upon the court notwithstanding the initiation of the civil suit by the contractor, to carry out its function as set out in s. 10, namely to refer the dispute to arbitration unless the arbitration agreement is null, void or inoperative ...

[53] The court would hold the parties to their arbitration agreement. It is imperative upon the court to stay the court proceedings once it is shown that there is a valid arbitration agreement – one which is not null and void, or inoperative or incapable of performance.

[54] The second way a matter comes to court when there is an arbitration agreement could be a case where one party to the arbitration agreement has the option, in the event of a dispute, to refer the matter to court or to arbitration and the option elected by that party is that of going to court. Such was the case in *Wilson Taylor Asia Pacific Pte Ltd v. Dyna-Jet Pte Ltd* [2017] SGCA 32, where the Singapore Court of Appeal confirmed that a unilateral or 'one-way' asymmetrical arbitration agreement which gives only one party the option to arbitrate is a valid and enforceable arbitration agreement.

[55] Yet a third way could be when both parties to the arbitration agreement have the option to either proceed to court or to arbitration and one party has proceeded to court and the other party elects to proceed to arbitration.

[56] In all the three scenarios, the question or test is the same. Assuming the matter that has arisen, is one covered by the arbitration agreement: Is there a valid arbitration agreement which is not null and void or inoperative or not capable of performance? Once it is shown that there is a valid

arbitration agreement that does not suffer from the infirmities of being null and void, or is inoperative or not incapable of performance, the court would gravitate towards a stay of the court proceedings and grant the stay order.

[57] This is so not just because of s. 10(1) of the AA 2005 but also s. 8 of the AA 2005 which constrains the court to take a hands-off approach when dealing with matters the subject of an arbitration agreement under the AA 2005 specifically permits interference. Section 8 reads:

> **Extent of court intervention**
>
> 8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

[58] The intervention under s. 10 as provided for is to ensure no further intervention in the matter the subject of an arbitration agreement. It is an intervention to stop all interventions unless expressly provided otherwise in the AA 2005.

[59] The giving of an option to arbitrate cannot introduce vagueness or ambiguity into the arbitration agreement. An option gives a party a choice. An option given to only one party gives a choice only to that party. An option given to both parties gives the choice to both the parties.

[60] With the greatest of respect to the High Court, we are of the considered view that just because an option is available, it does not mean that the parties' intention to proceed with arbitration is less certain and not mandatory as in lacking contractual commitment to arbitrate their disputes or differences. The arbitration clause is what it says it is – giving an option equally to both the parties to elect between going to court or arbitration. Before the option is exercised, either party could potentially opt for arbitration. Once either party opts for arbitration, an arbitration agreement would have come into existence.

[61] A few permutations may happen in a case where both parties have been given an option to go to court or to arbitrate. One does not have to call in aid from any algebra or algorithm to get the answer. Where both parties opt for arbitration, there is no issue. So too where both parties opt to go to court. Where a party chooses to go to court and the other party chooses to arbitrate, then the court would apply the test set out in s. 10(1) of the AA 2005. The test is whether there is a valid arbitration agreement that is not null and void and which is not inoperative or not incapable of being performed.

[62] There is no basis to say that once an option to go to court is exercised, the option for the other party is extinguished. Otherwise, the parties would unwittingly be jostling to jam the other party's choice and forsaking any negotiations and mediations that is encouraged before litigation. To say that the first to opt for going to court would prevail over a subsequent choice by

the other party to opt for arbitration would be to prioritise one option over the other when both could be validly exercised. It would also be to reward a party who is quick on the draw to launch into litigation first when no effort should be spared for the parties to attempt negotiation and mediation before proceeding with a court action or arbitration.

[63] The gravitation towards arbitration is that going to court has always been a right of a party that cannot be taken away in the event of a dispute between the parties. It is a default position. Even without having to provide expressly for it, the parties would always have a right to go to court. It is a case where, for clarity and out of an abundance of caution this right to proceed to court is spelt out as an option in contradistinction to arbitration.

[64] Unlike the right to go to court, the right to go for arbitration has to be provided for by agreement of the parties in an arbitration agreement. It is not a default position but a position only by decision or design of the parties with sometimes an option being given to one or both parties to be able to exercise this option.

[65] When confronted with two equally valid options to go to court or to go to arbitration, the court would have to apply the test in s. 10 of the AA 2005 which merely requires the court to establish if there is a valid arbitration agreement covering the matter and that the arbitration agreement is not null and void or not inoperative or not incapable of performance.

[66] The court does not have to choose between which of the two valid options by each of the parties it should uphold because even the questions that the court has to ask itself and with that the test to be applied is skewed in favour of arbitration. It is a case where when confronted with two valid options because the parties could not agree with each other to either together proceed to court or to arbitration, the court then would decide on the basis of whether there is a valid arbitration agreement or an exercise of an option to proceed to arbitration.

[67] The court decides from the perspective of whether the right to arbitrate has been validly exercised and not on the basis of which right is exercised first. This is because the arbitration agreement is not drafted in the manner of giving the right that is exercised first, in this case going to court, as the prevailing right that would trounce the other party's right to arbitrate.

[68] The choice of going to court first does not bring the whole of the disputes within the matters for the court to decide because the second party opting for arbitration has a counterclaim which option, once exercised, has the effect of bringing the matters arising from his dispute to be within the jurisdiction of the arbitrator. This is a case where there is no basis for saying that the first option once exercised, has taken away the option available to the second party, the defendant here, from being exercised by the second

party. Both parties would know from the language employed in the arbitration clause that there may well be a situation like the present, where one party exercises the option to go to court and the other then exercises its option to arbitrate.

[69] There is no exhaustion of rights just because one party has opted for litigation first. Neither does the right to go to court once exercised nullifies or extinguishes the right of the other party to opt to arbitrate. Parties have contemplated that if one party opts for going to court the other party may well elect to go to arbitrate, in which instance the court would grant a stay should the other party apply before taking any further action in court, to stay the court action.

[70] Both rights are equally valid rights in that the plaintiff may exercise its right to go to court as here, and the defendant the right to go for arbitration and the court would decide based on the test in s. 10 and not on which party exercises its right first.

[71] The Supreme Court of Victoria's case of *Manningham City Council Dura (Australia) Constructions Pty Ltd* [1999] VSCA 158 ('*Manningham City Council's*') addressed this issue. The arbitration clause housed in clause 13.03 of the JCC-D 1994 which contract was issued by a committee comprising representatives of architects, builders and building owners and managers reads as follows:

> 13.03 Further Notice Before Arbitration Or Litigation
>
> In the event that the dispute cannot be resolved in accordance with the provisions of Clause 13.02 or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, **either party may** by further notice in writing which shall be delivered by hand or sent by certified mail to the other party **refer such dispute to arbitration or litigation.** The service of such further notice under this Clause 13.03 shall also be a condition precedent to the commencement of any arbitration or litigation proceedings in respect of such dispute.
>
> (emphasis added)

[72] Not unlike the instant case, the proprietor there proceeded with litigation first by giving a notice to that effect followed by the service of the writ and the builder gave notice to proceed with arbitration and applied to court for a stay of the proceedings under their s. 53(1) of the Commercial Arbitration Act 1984.

[73] It was argued by the proprietor that to qualify to be an arbitration agreement, the agreement must refer all disputes to arbitration only and that as cl. 13 contemplated both arbitration and litigation, the proprietor submitted that it was not an agreement to refer disputes to arbitration. Under s. 4(1) of their Act an "arbitration agreement" is defined as "an agreement in writing to refer present or future disputes to arbitration," which is similar to s. 9(1) of our AA 2005. Our s. 9(1) of the AA 2005 reads:

> 9. (1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[74] Buchanan JA disagreed and quoted the Australian High Court case of *PMT Partners Pty Ltd (In Liquidation) v. Australian National Parks And Wildlife Service* [1995] HCA 36; [1995] 184 CLR 301 ("*PMT Partners'* case) where it was held that the statutory definition also caught an agreement which enabled a party to choose arbitration as the means of resolving a dispute. The statutory definition was not limited to existing references to arbitration. In that *PMT Partners'* case (*supra)* Brennan, CJ, Gaudron and McHugh, JJ said, at 310:

> The words 'agreement ... to refer present or future disputes to arbitration' in s. 4 of the Act are, in their natural and ordinary meaning, quite wide enough to encompass agreements by which the parties are bound to have their disputes arbitrated if an election is made or some event occurs or some condition is satisfied, even if only one party has the right to elect or is in a position to control the event or satisfy the condition.

[75] Toohey and Gummow, JJ said at 323:

> ... The terms of the definition of 'arbitration agreement' in s. 4 of the Act extend to an agreement whereby the parties are obliged if an election is made, particular event occurs, step is taken or condition is satisfied (whether by either or both parties) to have their dispute referred to arbitration.

[76] Buchanan JA further observed as follows:

> 27. … *The agreement in terms contemplates that a dispute may be resolved by litigation,* thereby making express that which was implicit in the agreement considered by the High Court in the *PMT Case*. *However, it remains an agreement by which the parties are bound to have their disputes arbitrated if certain conditions are fulfilled. If a notice is properly given under clause 13.03 referring the dispute to arbitration and security for costs is provided, the dispute is referred to arbitration because the parties have already agreed that the dispute will be resolved by arbitration upon the occurrence of those events.*
>
> In my view it would be inconsistent with the approach of the High Court in the *PMT Case* to limit arbitration agreements as defined in s. 4 of the Act to those which in terms contemplate the resolution of all disputes by arbitration. As the High Court held, *the statutory definition is fulfilled if an agreement makes provision for arbitration, albeit there is no guarantee that there will be arbitration. The agreement in the present case makes provision for arbitration, and in my view is no less an arbitration agreement within the meaning of the Act because it recognises that litigation rather than arbitration may ensue in a particular case.* An agreement which expressly commits all disputes to arbitration cannot prevent a party resorting to litigation. … (emphasis added)

[77] Parties must have known the law states so that should a party opt to arbitrate pursuant to an arbitration agreement, be it one that is the result of exercising an option, the other party would suffer the stay of the court proceedings that it has begun. The party opting for going to court would be hard-pressed to insist on continuing with the court proceedings as an arbitration agreement is a special bargain struck with the benefit of party autonomy and confidentiality which a court would be compelled not to stay the arbitration.

[78] Even for the sake of argument, if the court had proceeded with the two options being equally valid options, the court would still have to decide on which one to stay for it would be highly undesirable for disputes of the parties where both have a claim against each other arising out of the same DACT and the same project to be heard before two different forums with potentially different outcomes arising from different findings of facts, not to mention a waste of valuable time and resources when a single mode of dispute resolution would be able to fully dispose of all issues raised by the parties.

[79] Here again the court would place a premium on party autonomy, confidentiality and speed of disposal as the advantages to be had that is not available to the parties in a court action and so would favour arbitration in preference to going to court or at the very least to stay the court action in favour of arbitration and to give consequential directions that parties be bound by certain findings of facts already decided by the arbitral tribunal. As one may surmise, such an order is not altogether feasible and expedient and the viable alternative as constrained by s. 10 of the AA 2005 is that the court would stay the court action in favour of arbitration for so long as there is an arbitration agreement as we have so held here.

[80] Section 10 of the AA 2005 has an inherent preference towards upholding arbitration agreement once there is an agreement to arbitrate where the parties have agreed beforehand or as here in this case, one party has validly exercised its option to elect to proceed with arbitration.

[81] In the *Hermes One* case (*supra*), it was further postulated as follows:

> 18. Other English authorities affirm the validity of a provision entitling either party to elect or opt for arbitration, but do so again in a context where (unlike the present) the contract expressly contemplated court proceedings, if neither party chose arbitration.
>
> Thus, in the earlier case of *Westfal-Larsen and Co A/S Ikerigi Compania SA ("The Messiniaki Bergen")* [1983] 1 Lloyd's Rep 424, cited by Colman J in Lobb Partnership, clause 40(a) of a charterparty provided for the application of English law while clause 40(b) provided that any dispute arising under the charter "shall be decided by the English courts to whose jurisdiction the parties agree", but continued:

> Provided that either party may elect to have the dispute referred to the arbitration of a single arbitrator in London in accordance with the Arbitration Act 1950 … Such election shall be made by written notice …

Bingham J concluded at p 426:

> The proviso is not an agreement to agree because upon a valid election to arbitrate (and assuming the clause to be otherwise effective) no further agreement is needed or contemplated. It is, no doubt, true that by this clause the parties do not bind themselves to refer future disputes for determination by an arbitrator and in no other way. Instead, the clause confers an option, which may but need not be exercised. I see force in the contention that until an election is made there is no agreement to arbitrate, *but once the election is duly made (and the option exercised) I share the opinion of the High Court of Delhi in the Bharat case (Union of India v. Bharat Engineering Corp (1977) 11 ILR Delhi 57) that a binding arbitration agreement comes into existence.* (emphasis added)

[82] As Winneke P reasoned in the *Manningham City Council's* case (*supra*):

> In my view, it was the parties' intention that a dispute would only be resolved by litigation if both parties were in agreement that such was the method to be adopted with respect to a particular dispute. Such an agreement would, no doubt, be inferred where one party, following negotiations, gave notice referring the dispute to litigation and the other party thereafter accepted that as the preferred method of resolution.

[83] A party cannot proceed to court when the other party wants to arbitrate pursuant to a valid arbitration agreement. This is so whether the right to proceed with arbitration is either at the option of one party or that both have the option to choose either option or to choose one option normally stated to be arbitration. The test is not whether there is a valid agreement to go to court for that is an inherent right in the absence of a special bargain to arbitrate. The test is whether any one of the parties has opted for arbitration at which instance an arbitration agreement has come into being.

[84] The test is whether there is an arbitration agreement within the meaning of s. 9 of the AA 2005 and if the requirements of s. 10(1) have been fulfilled when a stay of the court proceedings in favour of arbitration is applied for in that the matter before the court is the subject of the arbitration agreement and the applicant has not taken further steps in the court proceedings and that the arbitration agreement is not otherwise null and void, inoperative or not capable of being performed.

[85] It is the applicant/defendant that has the burden of proof on the balance of probabilities to show that there exists a valid arbitration agreement that is clear and unambiguous. The evidential burden then shifts to the plaintiff to show that the arbitration agreement is null and void,

inoperative or incapable of being performed. The test, especially in a case of interpretation of the arbitration clause, is one involving a finding on the balance of probabilities that there is a valid and binding arbitration agreement.

[86] Parties should not be allowed to resile from the special bargain struck. Whilst there is no guarantee that the parties would proceed with arbitration that does not make the option to arbitrate ambiguous or less than clear an agreement to arbitrate.

[87] We find that the arbitration agreement in question giving the parties to proceed to court or to arbitration is a valid arbitration agreement once a party opted for arbitration as such an agreement is valid, clear and unambiguous and it is not null and void nor is it inoperative or incapable of being performed. Being satisfied that the requirements of s. 10 of the AA 2005 have been met we are left with one recourse, which is to uphold the arbitration agreement and to stay the court proceedings.

Whether The Doctrine Of Kompetenze-kompetenze Is Such That The Arbitral Tribunal Itself Is Tasked To Rule On The Validity Of The Arbitration Agreement

[88] Section 18 of the AA 2005 expressly empowers the arbitral tribunal to rule on whether it has jurisdiction to hear the matter raised before it. It covers issues of the existence as well as the extent of the arbitration agreement. Here, the existence of the arbitration clause is not in dispute and the only dispute at this threshold stage is whether such an arbitration clause as worded is a valid arbitration agreement that is not null and void and that is operative and capable of being performed. It is thus a question of interpretation of the arbitration clause in question. All that the court has to be satisfied is whether there is a valid arbitration agreement.

[89] In *Far East Holdings Bhd & Anor v Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693 at para. [65] it was held that the construction of a contract is a question of law.

[90] Section 18(1) and (2) of our AA 2005 reads:

> **Competence of arbitral tribunal to rule on its jurisdiction**
>
> 18. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the *existence or validity of the arbitration agreement.*
>
> (2) For the purposes of subsection (1) -
>
> (a) an arbitration clause which forms part of an agreement shall be treated as an agreement independent of the other terms of the agreement; and

(b) a decision by the arbitral tribunal that the agreement is null and void shall not *ipso jure* entail the invalidity of the arbitration clause.

(c)

(3) *A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence.*

(4) A party is not precluded from raising a plea under subsection (3) by reason of that party having appointed or participated in the appointment of the arbitrator.

(5) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(6) Notwithstanding subsections (3) and (5), the arbitral tribunal may admit such plea if it considers the delay justified.

(7) The arbitral tribunal may rule on a plea referred to in subsection (3) or (5) either as a preliminary question or in an award on the merits.

(8) *Where the arbitral tribunal rules on such a plea as a preliminary question that it has jurisdiction, any party may, within thirty days after having received notice of that ruling appeal to the High Court to decide the matter.*

(9) While an appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(10) *No appeal shall lie against the decision of the High Court under subsection (8).*
(emphasis added)

[91] We appreciate that in making a finding that the agreement is not null and void, not inoperative or not incapable of being performed, it would have to do so after hearing both parties. Be that as it may, it has been argued that the decision is an interim decision made on a *prima facie* basis as the same issue is allowed to be raised before the arbitral tribunal as envisaged in s. 10(3) of the AA 2005.

[92] Section 10(3) when dealing with a stay application for a matter already before the court also provides as follows:

(3) Where the proceedings referred to in subsection (1) have been brought, arbitral proceedings may be commenced or continued, and an award may be made, while the issue is pending before the court.

[93] In *Cockett Marine Oil (Asia) Pte Ltd v. MISC Bhd & Another Appeal* [2023] 1 CLJ 20; [2022] 6 MLJ 786, the Court of Appeal applied the *prima facie* test as follows:

[26] We share the view of the appellant that the correct position in law is as follows:

Where a party challenges the existence of the arbitration agreement, the jurisdiction of the court is to consider whether *prima facie* there is an arbitration agreement to resolve disputes. In

this respect the jurisdiction of the court is to decide if the issue on the existence of the arbitration agreement is in dispute and not merely a dubious or frivolous allegation.

…

[42] Lastly, in our judgment, by virtue of the explicit provisions of s. 18 of the AA the question of the existence of an arbitration agreement is a question for determination by the arbitral tribunal and not within the purview of the court's jurisdiction once reference is made to an arbitration clause in any document or electronic communication between the contracting parties that was not denied or rejected as in the present scenario. We concur with the contention of Cockett on this threshold question that the jurisdiction of agreement jurisdiction of the court is limited to identifying whether there is *prima facie* existence of an arbitration agreement and once a *prima facie* determination is made the matter is to be stayed and referred to arbitration for a full determination on whether there is in fact a binding arbitrations agreement.

[43] It is indisputable that the jurisdiction of the court under s. 10 of the AA makes it mandatory to stay any matter which is subject of an arbitration agreement and to refer the parties to resolve the dispute by arbitration.

[94] It appears that s. 10 envisages a situation where a matter is before the court and an applicant under s. 10 applies for a stay on the grounds that there is an arbitration agreement governing the matter and the matter may well have commenced and continued in an arbitration. Thus, the applicant in a s. 10 application may well be the claimant in an arbitration proceeding and it is the plaintiff who is before the court in a s. 10 application who would be applying to the arbitral tribunal to terminate the arbitral proceedings on the grounds that it does not have jurisdiction as there is no binding arbitration agreement.

[95] The arbitral tribunal may proceed to deal with the jurisdictional issue arising from whether there is in existence an arbitration agreement which is valid as a preliminary question. It may also deal with it on an award on its merits. As Parliament has conferred this right on an arbitral tribunal to so decide on whether it has jurisdiction, the court cannot take that away from the arbitral tribunal. Perhaps that best explains why courts in some jurisdictions like Singapore and Hong Kong on a provision in *pari materia* with our s. 10 of the AA 2005 have preferred the *prima facie* test in a stay application of a court proceeding on ground that there is an arbitration agreement governing the matter before the court. The matter would come up again for decision, this time by way of an appeal from a full merits argument from the arbitral tribunal's ruling on jurisdiction under our s. 18(8) of the AA 2005. See s. 32 of the UK Arbitration Act 1996, s. 21(9) of the Singapore Arbitration Act 2001, s. 10(3) of the Singapore International Arbitration Act 1994 and s. 34(1) of the Hong Kong Arbitration Ordinance Cap 609.

[96] The Singapore case following the *prima facie* test is its Court of Appeal case of *Tomolugen Holdings Ltd v. Silica Investors Ltd* [2015] SGCA 67 and in Hong Kong its Court of Appeal case of *Private Company 'Triple V Inc' v. Star (Universal) Co Ltd* [1995] 3 HKC 129.

[97] The UK courts seem to apply the full merits test in their equivalent of a stay of the court proceedings under their s. 9 of the Arbitration Act 1996. Thus, in *Joint Stock Company 'Aeroflot Russian Airlines' v. Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [72] to [80], it was held by Aikens LJ that s. 9(1) thus imposes a burden on the party seeking a stay to prove that there is ... (a) a concluded arbitration agreement as defined in the AA 1996, and (b) that it covers the disputes that are the subject of the court proceedings. If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under s. 9(1) and (4) of the AA 1996. If the requirements of s. 9(1) are met, the burden shifts to the party resisting a stay to "satisfy" the court that the apparently existing arbitration agreement is 'null and void, inoperative or incapable of being performed' under s. 9(4).

[98] Be that as it may the UK courts have also said that in some cases it may exercise its inherent jurisdiction to grant a stay of the court proceedings and let the arbitral tribunal get on with determining the dispute. Thus, in the *Joint Stock Company 'Aeroflot Russian Airlines' v. Berezovsky's case* (*supra*) Aikens LJ explained as follows in para. [79]:

> 79. In theory I suppose **the court could order that there be a trial of an issue to determine whether the arbitration agreement was 'null and void' or 'inoperative'.** But if the evidence and possible findings going to the issue of whether the arbitration agreement is 'null and void' or 'inoperative' also impinge on the substantive rights and obligations of the parties the court is unlikely to do so unless such a trial can be confined to 'a relatively circumscribed area of investigation'. Otherwise, in such a case, where the court is satisfied of the existence of the arbitration agreement and that the matters in dispute are within its scope, then logically it must be for the arbitral tribunal finally to decide the "s. 9(4) matters", assuming it has compétence-compétence to do so … **In such a case, the right course for the court to take is to grant a stay under s. 9(4) and let the arbitral tribunal get on with determining the dispute.**
>
> (emphasis added)

[99] The options available to the UK courts in even ordering a trial of the issue as to whether there is a valid arbitration agreement that is not null and void or inoperative is because of the provision in their Civil Procedure Rules ('CPR') 62.8(3). In Mustill & Boyd: *Commercial and Investor State Arbitration*, 3rd edn, LexisNexis 2024, the learned editors observed as follows:

> 6.18 *If the court considers that it cannot decide these questions in summary fashion on the basis of the written evidence put before it then it has two options:*

> (1) *it can direct an issue to be tried by the court pursuant to CPR 62.8(3); or (2) it can stay the proceedings under its inherent jurisdiction so that the tribunal can exercise its kompetenz-kompetenz under s. 30 of the AA 1996. Joint Stock Company 'Aeroflot Russian Airlines' v. Berezovsky* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep 242 at [73] and *Al-Naimi v. Islamic Press Agency Inc* [2000] 1 Lloyd's Rep 522,524-526.
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> 6.19 Which of these two routes will be taken by the court is a matter of discretion and case management, with the court having regard to the facts and circumstances. However, it has been held that the court should start from the position that it is only in exceptional circumstances that the discretion will be exercised. (emphasis added)

[100] In fact, in the earlier English case of *Nigel Peter Albon v. Naza Motor Trading Sdn Bhd* [2007] 2 All ER 1075, the court allowed itself the liberty to choose from four possible approaches when the conclusion of an arbitration agreement is in issue as follows:

> [16] Guidelines were laid down by Judge Humphrey Lloyd QC in *Birse Construction Ltd v. St David Ltd* [1999] BLR 194 at first instance and (though the decision of the judge was reversed) his statement of the guidelines was approved on appeal by the Court of Appeal ([1999]) 70 Con LR 10) and again by the Court of Appeal in the later case of *Al-Naimi (t/a Buildmaster Construction Services) v. Islamic Press Services Inc* [2000] 70 Con LR 21. These *guidelines* are to the effect that on an application for a stay such as the present *where the conclusion of the arbitration agreement is in issue,* there are *four options open to the court: (1) (where it is possible to do so) to decide the issue on the available evidence presently before the court that the arbitration agreement was made and grant the stay; (2) to give directions for the trial by the court of the issue; (3) to stay the proceedings on the basis that the arbitrator will decide the issue; and (4) (where it is possible to do so) to decide the issue on the available evidence that the arbitration agreement was not made and dismiss the application for the stay.* The Court of Appeal adopted the second of these options. The guidelines and the decision of the Court of Appeal establish that on an application under s. 9(1) of the 1996 Act the court can try and (subject to one qualification) should decide the issue whether the arbitration agreement was concluded. The minor qualification in respect of which the guidelines are not in accord with the construction which I have adopted is in respect of the third of the guidelines. *Where there is an issue which the court cannot resolve on the available evidence on the application as to whether the arbitration agreement was concluded, the court indeed can stay the proceedings so that the arbitrators can decide the issue, but only by exercising its inherent jurisdiction and not by exercising any jurisdiction under s. 9.* Support for this view may be found in a passage in the Al Naimi case ([2000] 70 Con LR 21 at 30).
>
> …
>
> [20] I would answer the first and second submissions as follows. Whilst the *doctrine of 'Kompetenz-Kompetenz'* (which is given effect in a domestic arbitration by s. 30 of the 1996 Act) provides that the arbitral tribunal shall have jurisdiction to determine whether the arbitration agreement was ever concluded, *it does not preclude the court itself from determining that question.*

There are *two reasons* why the court must have jurisdiction to rule on whether the arbitration agreement was concluded. The first is that the rule of law in general and subject only to limited exceptions requires that *a party should not be barred from access to the court for the resolution of disputes* unless the grounds for such bar are established. A bar on the ground of *the alleged conclusion of an arbitration agreement* (in general and subject only to limited exceptions) *is not established unless and until the court has ruled on the issue whether it has been concluded.* The second is that, unless and until it is held that the arbitration agreement has been concluded, the compelling factors requiring respect for the terms agreed regarding arbitration do not come into play or at any rate do not come into play with their full force and effect. (emphasis added)

[101] Our Court of Appeal has also kept the options open as to which approach to take and has coined the "just and convenient test" with respect to the approach to take in circumstances that may justify the court deciding for instance a forgery issue affecting the arbitration agreement itself. In such a case, there may be the need to subpoena witnesses and to compel their attendance and the availability of witnesses within the jurisdiction of the court may be factors tipping the balance for the court to follow an approach akin to "full merits test" and not a *prima facie* test.

[102] Our Court of Appeal in *Macsteel International Far East Limited v. Lysaght Corrugated Pipe Sdn Bhd* [2023] CLJU 1078; [2023] 1 LNS 1078 clarified as follows:

[33] Based on the available options in the guidelines prescribed in *Peter Albon (supra), we acknowledge that the determination on whether there is a concluded arbitration agreement that is not null and void cannot be meaningfully made based on the existing affidavit evidence before us to invoke the 1st option or 4th option. There is the necessity for further investigation here. This may be made by the High Court pursuant to the 2nd option premised upon s. 10(1) AA or by the arbitral tribunal pursuant to the 3rd option premised upon s. 18 (1) and (2) AA.* In other words, both the High Court and the arbitral tribunal are forums that have jurisdiction and power to investigate and conclude on the validity of the arbitration agreement.

[34] In such instance of concurrent jurisdiction and power, we proffer a flexible approach that *the appropriate forum to investigate and determine the validity of the arbitration agreement must be the forum that is on balance more just and convenient having regard to the facts and circumstances in issue.*

[35] It is plain and obvious to us that the investigation ought to be carried out in Malaysia because of the specific fact that the impugned supply contracts emanated from Malaysia probably through the participation of PR which is based in Malaysia. If the investigation is undertaken by the High Court, there is the availability of the power to compel PR's attendance *via* subpoena which is unavailable to the Hong Kong based Arbitration. In this sense, the *Malini Ventura* (*supra*) case is distinguishable on its special facts particularly in that the antecedent transaction was all done in Singapore. (emphasis added)

[103] We are emboldened to keep a flexible approach depending on the factual matrix of each case as our O. 69 r. 10(3) of our Rules of Court 2012 is similar to the UK provision under its O. 62.8(3) of the CPR and both provisions are set out below for ease of reference and comparison:

Order 62.8(3) of the UK CPR:

Where a question arises as to whether-(a) an arbitration agreement has been concluded or (b) the dispute which is the subject-matter of the proceedings falls within the terms of such an agreement **the court may decide that question or give directions to enable it to be decided and may order the proceedings to be stayed pending its decision.**

Order 69 Rule 10(3) Rules of Court 2012

(1) An application seeking a stay of legal proceedings under section 10 of the 2005 Act shall be served on all parties to those proceedings who have given an address for service.

(2) A copy of an application under paragraph (1) shall be served on any other party to the legal proceedings (whether or not he is within the jurisdiction) who has not given an address for service, at

(a) his last known address; or

(b) a place where it is likely to come to his attention.

(3) **Where a question arises as to whether –**

(a) an arbitration agreement has been concluded or

(b) the dispute which is the subject matter of the proceeding falls within the terms of such agreement,

the Court may decide that question or give directions to enable it to be decided and may order the proceeding to be stayed pending its decision.
(emphasis added)

[104] Part Two of the Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 has this helpful information on its art. 16 on which our s. 18 of the AA 2005 is copied from or modelled after:

4. Jurisdiction of arbitral tribunal

(a) Competence to rule on own jurisdiction

25. Article 16 (1) adopts the two important (not yet generally recognized) principles of "Kompetenz-Kompetenz" and of separability or autonomy of the arbitration clause." *Kompetenz-Kompetenz" means that the arbitral tribunal may independently rule on the question of whether it has jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, without having to resort to a court.* Separability means that an arbitration clause shall be treated as an agreement independent of the other terms of the contract. As a consequence, a decision by the arbitral tribunal that the

contract is null and void shall not entail ipso jure the invalidity of the arbitration clause. Detailed provisions in paragraph (2) require that any objections relating to the arbitrators' jurisdiction be made at the earliest possible time.

26. *The competence of the arbitral tribunal to rule on its own jurisdiction (ie, on the foundation, content and extent of its mandate and power) is, of course, subject to court control.* Where the arbitral tribunal rules as a preliminary question that it has jurisdiction, article 16(3) allows for immediate court control in order to avoid waste of time and money. However, three procedural safeguards are added to reduce the risk and effect of dilatory tactics: short time-period for resort to court (30 days), court decision not appealable, and discretion of the arbitral tribunal to continue the proceedings and make an award while the matter is pending before the court. *In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under article 34 or in enforcement proceedings under article 36.*

(emphasis added)

[105] In the present case we do not have to enter the fray on those cases where if the underlying agreement is void *ab initio* as in the relevant documents were forged, then the arbitration agreement would also be void. This is in contradistinction to those cases where the underlying contract may have been procured through fraud, duress, coercion or *via* an illegal act, in which case the underlying contract may be null and void but the arbitration agreement survives under the doctrine of separability. In the case before us, we are not dealing with any allegations of forgery or that there was fraud, duress, coercion or illegality. We merely have to interpret the arbitration clause which can be undertaken summarily as it is a question of law in interpreting the words used and not dependent on what the parties say they mean by the clause in issue.

[106] Whether it is a *prima facie* finding or a finding on the full merits of the case, appear to yield no difference in result as even a *prima facie* finding of a valid arbitration agreement is sufficient for the grant of a stay in favour of arbitration as the plaintiff could not show that the arbitration agreement is otherwise null and void, inoperative or incapable of performance.

Decision

[107] For all the reasons given above, we had allowed the appeal of the defendant as appellant here and we set aside the order to the High Court in dismissing the stay application made under s. 10 of the AA 2005. We granted an order to stay the court proceedings pending reference to arbitration as prayed for in the High Court.

[108] We further ordered costs of RM15,000 here and below to the appellant subjects to allocator.